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Supreme Court, U.S.
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In The
Supreme Court of the United States

FRANKLIN DURAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

May a person whose conduct is not contrary to any laws or interests of the United States, be convicted of failing to register as an agent of a foreign government under Title 18 U.S.C. § 951, absent proof of any notice of, or knowledge of the registration required by the statute and federal regulations?

II.

Does the due process clause require proof of notice or knowledge of a duty to register as an agent of a foreign government under Title 18 U.S.C. § 951, as applied to a person whose conduct is not illegal or inimical to the interests of the United States?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Franklin Duran petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on February 16, 2010. It is reported at 596 F.3d 1283 (11th Cir. 2010). The opinion is reprinted in the Appendix at 1a - 33a.

JURISDICTION

The judgment and opinion of the Eleventh Circuit affirming Franklin Duran's conviction and sentence was entered on February 16, 2010. A timely Petition for Panel Rehearing was denied on March 25, 2010. App. 34a - 35a. This petition for writ of certiorari is filed within 90 days of the March 25, 2010 denial of rehearing. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED
FIFTH AMENDMENT

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor

shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 371
Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 951
Agents of foreign governments

(a) Whoever, other than a diplomatic or consular officer or attaché, acts in the United States as an agent of a foreign government without prior notification to the Attorney General if required in subsection (b), shall be

fined under this title or imprisoned not more than ten years, or both.

(b) The Attorney General shall promulgate rules and regulations establishing requirements for notification.

(c) The Attorney General shall, upon receipt, promptly transmit one copy of each notification statement filed under this section to the Secretary of State for such comment and use as the Secretary of State may determine to be appropriate from the point of view of the foreign relations of the United States. Failure of the Attorney General to do so shall not be a bar to prosecution under this section.

(d) For purposes of this section, the term "agent of a foreign government" means an individual who agrees to operate within the United States subject to the direction or control of a foreign government or official, except that such term does not include–

> **(1)** a duly accredited diplomatic or consular officer of a foreign government, who is so recognized by the Department of State;
>
> **(2)** any officially and publicly acknowledged and sponsored official or representative of a foreign government;
>
> **(3)** any officially and publicly acknowledged and sponsored member of the staff of, or employee of, an officer, official, or representative described in paragraph (1) or (2), who is not a United States

citizen; or

(4) any person engaged in a legal commercial transaction.

(e) Notwithstanding paragraph (d)(4), any person engaged in a legal commercial transaction shall be considered to be an agent of a foreign government for purposes of this section if--

(1) such pe rson agrees to operate within the United States subject to the direction or control of a foreign government or official; and

(2) such person--

(A) is an agent of Cuba or any other country that the President determines (and so reports to the Congress) poses a threat to the national security interest of the United States for purposes of this section, unless the Attorney General, after consultation with the Secretary of State, determines and so reports to the Congress that the national security or foreign policy interests of the United States require that the provisions of this section do not apply in specific circumstances to agents of such country; or

(B) has been convicted of, or has entered a plea of nolo contendere with respect to, any offense under section 792 through 799, 831, or 2381 of this title or under section 11 of the Export Administration Act of 1979, except that the provisions of this subsection shall not apply to a person described in this clause for a period of more than five

years beginning on the date of the conviction or the date of entry of the plea of nolo contendere, as the case may be.

REGULATORY PROVISIONS INVOLVED

Part 73 Notification to the Attorney General by Agents of Foreign Governments

Title 28 C.F.R. §73.1 Definition of Terms

(a) The term agent means all individuals acting as representatives of, or on behalf of, a foreign government or official, who are subject to the direction or control of that foreign government or official, and who are not specifically excluded by the terms of the Act or the regulations thereunder.

(b) The term foreign government includes any person or group of persons exercising sovereign de facto or de jure political jurisdiction over any country, other than the United States, or over any part of such country, and includes any subdivision of any such group or agency to which such sovereign de facto or de jure authority or functions are directly or indirectly delegated. Such term shall include any faction or body of insurgents within a country assuming to exercise governmental authority whether such faction or body of insurgents has or has not been regarded by the United States as a governing authority.

(c) The term prior notification means the notification

letter, telex, or facsimile must be received by the addressee named in § 73.3 prior to commencing the services contemplated by the parties.

Title 28 C.F.R. §73.3
Form of Notification

(a) Notification shall be made by the agent in the form of a letter, telex, or facsimile addressed to the Attorney General, directed to the attention of the National Security Division, except for those agents described in paragraphs (b) and (c) of this section. The document shall state that it is a notification under 18 U.S.C. 951, and provide the name or names of the agent making the notification, the firm name, if any, and the business address or addresses of the agent, the identity of the foreign government or official for whom the agent is acting, and a brief description of the activities to be conducted for the foreign government or official and the anticipated duration of the activities. Each notification shall contain a certification, pursuant to 28 U.S.C. 1746, that the notification is true and correct.

STATEMENT OF THE CASE

Franklin Duran was charged and convicted of violating and conspiring to violate 18 U.S.C. §951 – acting as an agent of a foreign government (Venezuela) without prior notification to the Attorney General of the United States. He was sentenced to 48 months imprisonment, a $175,000 fine, and three years of supervised release.

Duran, an established businessman in Venezuela, was

charged along with Carlos Kauffmann, Moises Maionica, Rodolfo Wanseele Paciello and Antonio Jose Canchica Gomez. Maionica and Kauffmann pled guilty and testified against Duran at trial. Paciello pled guilty but did not testify and Canchica Gomez, a Venezuelan intelligence agent, remains a fugitive. Antonini, a Venezuelan and United States citizen who lived in Key Biscayne, Florida and was Duran's best friend, had been stopped in August 2007 by customs officials in Argentina with $800,000 in cash; money that was believed to be from Venezuelan President Hugo Chavez to support the election campaign of Argentina's President Cristina Fernandez de Kirchner. Antonini, but not the $800,000, was released by Argentine authorities after Antonini falsely claimed the money as his own. After attending a reception for President Chavez in Buenos Aires, Antonini returned to Miami. The incident, a *cause celebre* in Argentina and Venezuela, became known as the "Suitcase Scandal."

The §951 failure to provide prior notification charge arose from Duran's subsequent activities in the United States in which he sought to convince Antonini to retain counsel in Argentina to resolve his legal problem there. Antonini was to claim the money as his own and pay a small fine, to avoid the implication that the money was from Venezuelan government sources.

At Duran's trial, Antonini, who had cooperated with the FBI and recorded conversations with Duran and others, related those efforts. Carlos Kauffmann, Duran's business partner, and Moises Maionica, a Venezuelan lawyer, both of whom had entered plea agreements with the federal prosecutors, related their roles in seeking to have Antonini take responsibility for the money. Duran's defense was that he did not act as an agent for the Venezuelan government, but he acted on his own behalf

and on behalf of Kaufmann and Antonini in order to extricate all of them from the scandal.

Duran had been implicated in the matter because Antonini falsely listed Duran's Caracas apartment address on the Argentine customs statement. Duran then contacted the Venezuelan Minister of the Interior and the Director of the Venezuelan intelligence agency (DISIP) in order to clarify that he had nothing to do with the $800,000. Duran was told that DISIP would be handling the matter. Duran and his brother went to Miami to talk to Antonini. Ultimately their strategy involved Antonini agreeing to retain counsel in Argentina who would use in Argentina forged and backdated documents placed in Venezuelan customs records. Those documents would show that the $800,000 was Antonini's and would resolve Antonini's legal issues in Argentina. A power of attorney in favor of the Venezuelan attorney, Maionica, was to be the vehicle for accomplishing their goal.

Antonini, who was cooperating with the FBI, refused to cooperate with the DISIP plan and wrote to President Chavez demanding that President Chavez give him $2 million in exchange for his agreement to the documentary coverup. Canchica Gomez, the DISIP agent, agreed on behalf of President Chavez, and in December 2007, Duran and Maionica met with Antonini in Miami to supply the necessary documents and discuss the power of attorney for the Argentine lawyer, and the $2 million payment. When they left the meeting, Duran and Maionica were arrested.

* * *

Several pre-trial and trial evidentiary issues were addressed and resolved pre-trial, at trial, and on appeal. But for the purposes of this petition, only one issue is presented. "The district court granted the Government's motion *in limine* excluding evidence of *mens rea* of Duran's failure to notify the Attorney General of his conduct as a foreign agent because §951 is a general intent crime that does not require proof that the defendant knew of the notification requirement." App. 8a. The Eleventh Circuit affirmed. App. 1a-33a.

Duran seeks certiorari to review that affirmance.

REASONS FOR GRANTING THE PETITION

Two reasons support granting the petition. The first is that the Court of Appeals' holding that "§951 is a general intent crime, and knowledge of the notification requirement need not be proven by the Government" (App. 14a), presents an important but unanswered question: is the lack of any *mens rea* requirement in a registration statute carrying a 10 year prison penalty consistent with due process of law? The second reason supporting *certiorari* is that the decision below conflicts with a series of decisions from this Court and other courts relating to the constitutional deficiencies in registration requirement statutes that do not have any notice or *mens rea* requirements.

1. The Important But Unanswered Due Process Question.

This Court has never addressed the *mens rea* issue in a Title 18 U.S.C. § 951 registration case. No court, save the Eleventh Circuit in this case, has addressed the registration

requirement where the defendant was not engaged in espionage, subversive activities, or conduct that was contrary to the laws or interests of the United States. The district court, at sentencing, noted that there was no suggestion that Duran was involved in espionage, intelligence gathering or any form of subversive activity in the United States. DE 488:119.

The Eleventh Circuit decision in *United States v. Campa*, 529 F.3d 980 (11th Cir. 2008), upon which the court below relied here, involved "[f]ive agents of the Cuban Directorate of Intelligence who were members of *La Red Avispa* ('The Wasp Network') who challenged their convictions and sentences for their espionage . . . ." *Id.* at 987. The cases relied upon by the court below in this case and in *Campa* involved subversive activities. Khaled Dumeisi "initiated contact with the IMUN [Iraqi Mission to the United States] and offered to publish articles supplied by them; . . . he received training and was asked to report on Iraqi opposition activities in the United States; . . . he was given a pen like those used by the IIS [Iraqi Intelligence Service] that could be used as a camera and a tape recorder . . . ." *United States v. Dumeisi*, 424 F.3d 566, 581 (7th Cir. 2005). Sami Latchin was also an IIS agent. *United States v. Latchin*, 554 F.3d 709, 715 (7th Cir. 2009). Truong Dinh Hung and Ronald Humphrey helped the Socialist Republic of Vietnam by providing "copies of diplomatic cables and other classified papers to the United States government dealing with Southeast Asia; documents that had been obtained surreptitiously" and then copied with the classification markings removed. *United States v. Hung*, 629 F.2d 908, 911-912 (4th Cir. 1980).

Thus this case presents an issue of first impression: whether proof of a *mens rea* requirement is necessary under §951 when the defendant is doing nothing illegal or subversive.

It presents the question in the context of a statute that provides for up to 10 years imprisonment and a substantial fine. Petitioner Duran was sentenced to 4 years and a $175,000 fine.

The court below drew no distinction between benign and malignant conduct, saying that such a distinction is irrelevant given the language of the statute: "there is no suggestion in the language of the statute, the legislative history, or cases that convictions under § 951 require the conduct to be of that [inimical to the interests of the United States] nature." App. 18a. As we show below, assuming *arguendo* that *any* conduct triggers the obligation to register with the Attorney General, such an approach heightens the due process concerns because a continuing theme in the registration/no *mens rea* requirement cases has been that the circumstances of the situations put the party on some notice that registration is likely or that the conduct is in some way problematic.

Under the broad view of the court below, a person simply carrying a letter from a foreign government official to a person in the United States could be convicted under §951 if he failed to notify the Attorney General. In these days of heightened communications and travel, the Eleventh Circuit's unboundaried view that any action or conduct can trigger the §951 registration requirement (App. 16a), presents an important and unanswered question, the answer to which would provide guidance to the universe of people who might otherwise unwittingly run afoul of the statutory requirement.

That practical reason for granting certiorari – to give notice to the world of whether, when, and how § 951 is to be viewed – is bolstered by the fact that this Court has struggled with the due process ramifications of notice, knowledge and

mens rea in a host of important registration and criminal cases. The lessons of those cases provide a strong argument that a ten year, no *mens rea* felony, which carries with it the stigma of being a foreign agent, is a worthy candidate for certiorari review.

2. The Conflict with Other Cases and the Principles of those Cases

In *Morissette v. United States*, 342 U.S. 246 (1952), the Court considered the growth of statutes which dispensed with *mens rea* requirements, noting that "lawmakers, whether wisely or not" have created offenses that "do not specify intent as a necessary element." *Id.* at 256. The Court generally condoned such legislation, saying "penalties commonly are relatively small, and conviction does not do grave damage to an offender's reputation. Under such considerations, courts have turned to construing statutes and regulations which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime. This has not however been without expressions of misgiving." *Id.* The Court noted that "a general abolition of intent as an ingredient of serious crimes have aroused the concerns of responsible and disinterested students of penology," citing several sources and this concern: "'[T]he fact remains that the determination between intent and negligence spells freedom or condemnation for thousands of individuals.'" *Id.* at n.14 (quoting Radin, Intent, Criminal, 8 Encye. Soc. Sci. 126, 130).

The *Morissette* Court, conscious of the difficulties in divining the dividing line between *malum in se* and *malum prohibitum*, echoed a warning voiced in *United States v. Dotterweich*, 320 U.S. 277, 280, 281 (1943): "'Hardship there doubtless may be under a statute which thus penalizes the

transaction though consciousness of wrongdoing may be totally wanting.'" *Morissette* continued: "Neither this Court, nor so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not." *Morissette*, 342 U.S. at 261.

Post-*Morissette*, the Court confronted the due process implication of a Los Angeles ordinance requiring a felon to register if in the city for more than five days. "The question is whether a registration act of this character violates due process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge." *Lambert v. California*, 355 U.S. 225, 227 (1958). Justice Douglas, writing for the Court, held that "[w]here a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process." *Id.* at 229-230.

The court below in this case recognized that "§951 appears to be a registration statute similar to the ordinance held unconstitutional in *Lambert v. California*." The court drew this distinction: "the registration statute in *Lambert* was held unconstitutional in part because it required the defendant merely to hold the status of felon, [but] under § 951, it is not sufficient for the defendant to hold the status of an agent of a foreign government – he must also act." App. 16a. The court made a distinction between "misfeasance and nonfeasance," saying that "Duran engaged in misfeasance by 'acting' as an agent of a foreign government without notifying the Attorney General before doing so." *Id.*

That sentence – the key to the Eleventh Circuit's effort

to distinguish *Lambert* – misapplies *Lambert*. "Misfeasance" is "a wrong, actual or alleged, arising from or consisting of affirmative action." Webster's Encyclopedic Unabridged Dictionary, Grammercy Books (1996). Being and acting as an "agent" is not inherently wrong. In *Lambert*, the "wrong" was not that Lambert was a felon; it was that she failed to register. Here, Duran's "wrong," similarly, was the failure to register. Since Duran's agency was not inherently illegal, his only "misfeasance," was his failure to register. That brings us back to *Lambert*, in more ways than one.

Lambert was a five to four decision that began with a nine to zero Conference vote to reverse her conviction. A.F. Brooks, *When Ignorance of the Law Became an Excuse: Lambert and Its Progeny*, American Journal of Criminal Law, Winter 1992, 279, 282 (1992). Justice Douglas' draft opinion, striking the ordinance on vagueness grounds, was not well received, and Justices Harlan and Clark were not convinced. Justice Harlan wrote: "'I don't like this statute one bit, but as applied to a California resident, I am inclined to think that the only basis for striking it down lies in the absence of a specific intent requirement.'" *Id.* at 285, (quoting Letter from Justice Harlan to Justice Douglas) n.38. Justice Clark wrote: "'I agree that actual notice is an essential element in prosecutive actions for failure to register, but would we not be on sounder ground if we held that and no more?'" *Id.*, n.39.

Those exchanges led to *Lambert* as we know it, but four justices fell off the Conference unanimous bandwagon, and Justice Frankfurter's dissent, joined by Justices Harlan and Whittaker, makes a point that is supportive of the *certiorari* reasons asserted here: the serious consequences of penalizing a failure to register absent proof of notice or knowledge of the requirement. Justice Frankfurter was sensitive to the

punishment/*mens rea* aspect: "Considerations of hardship often lead courts, naturally enough, to attribute to a statute the requirement of a certain mental element – some consciousness of wrongdoing and the law's command – as a matter of statutory construction. Then too, a cruelly disproportionate relation between what the law requires and the sanction for its disobedience may constitute a violation of the Eighth Amendment as a cruel and unusual punishment, and in respect to the States, even offend the Due Process Clause of the Fourteenth Amendment." *Lambert*, 355 U.S. at 232 (Frankfurter, J., dissenting).

Justice Frankfurter thought that "distinctions between feasance and nonfeasance . . . may have significance in the evolution of common-law notions of liability, but is inadmissible as a line between constitutionality and unconstitutionality," and he thought that "the present decision will turn out to be an isolated deviation from the strong current of precedents – a derelict on the waters of the law." *Id.* *Lambert* is no "derelict." It has been cited many times and is a mainstay in every criminal law casebook. In *Garrison v. State*, 950 So. 2d 990 (Miss. 2007), the Mississippi Supreme Court voiced approval of Justice Frankfurter's concerns, but applied the *Lambert* principle to reverse a conviction for failing to register as a sex offender where "Garrison requested jury instructions requiring notice, which were refused." *Id.* at 994.

In *United States v. Mancuso*, 420 F.2d 556 (2d Cir. 1970) Judge Kaufman applied *Lambert* to reverse a conviction under 18 U.S.C. § 1407, requiring felony narcotics convictees to register at border crossings. The statute carried a $1,000 fine and a year to three years imprisonment. He wrote: "The primary purpose of law, and the criminal law in particular, is to conform conduct to the norms expressed in the law. When

there is no knowledge of the law's provisions, and no reasonable probability that knowledge might be obtained, no useful end is served by prosecuting the violators." *Id.* at 559.

The court below dismissed *Mancuso* as "only persuasive authority in the Circuit, and our Court already decided in *Campa* that knowledge of the registration requirement is not an element of § 951." App. 17a. But the conduct in *Campa*, as we have shown *infra*, is not analogous to that here, and that is an important distinction because espionage and subversive activities do provide a form of "notice" to the actor that there may be culpability down the road. Sitting in a Miami restaurant and trying to help Hugo Chavez out of a delicate situation *vis a vis* Argentina is a different matter. In *United States v. Freed*, 401 U.S. 603 (1971), addressing a federal firearms registration statute, and the notion of no *mens rea*, the Court assayed *Lambert*, *Morissette* and *Dotterweich*, and concluded that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act. They are highly dangerous offensive weapons. . . ." *Id.* at 609. Some conduct is obviously sufficient to justify convictions without specific notice or knowledge.

Acting as an agent of a foreign government is not a *malum in se* act. Like many actions, innocent acts can become culpable, but notice and knowledge of that potential are the *sine qua non* under due process principles, especially when a ten year prison sentence is the penalty for not knowing.[1]

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[1] The court below wrote that Duran was not "acting completely innocently" because "his conduct involved some form of bribery or extortion on behalf of the Venezuelan government. . . ." App.23a and n.9. That comment bolsters our point: the conduct had nothing to

CONCLUSION

This case presents an important question that has long been a subject of controversy in criminal law. It presents it in a case involving a statute that started out targeting national security, defense, espionage and subversive activities. App.21a. Determining its scope today, as applied to conduct that does not compromise any of those concerns, merits review by this Court.

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do with United States' interests, and even if viewed as not "innocent," it was not of the genre that suggested a need to notify the Attorney General of the United States.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED FEBRUARY 16, 2010

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09-11446

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANKLIN DURAN,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

(February 16, 2010)

Before WILSON and ANDERSON, Circuit Judges, and RESTANI,* Judge.

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* Honorable Jane A. Restani , Chief Judge, United States Court of International Trade, sitting by designation.

Appendix A

WILSON, Circuit Judge:

Franklin Duran ("Duran"), a Venezuelan citizen, was convicted of conspiring with one of his business partners and three other co-conspirators to knowingly act in the United States as an agent of a foreign government, without prior notification to the Attorney General of the United States in violation of 18 U.S.C. § 371, and of acting in the United States as an agent of a foreign government, without prior notification to the Attorney General, in violation of 18 U.S.C. § 951, as a result of his involvement in attempting to cover up the so-called "Suitcase Scandal" between Venezuela and Argentina. Duran's business partner and the two other co-conspirators pled guilty to the same charges and testified against Duran at his trial. Duran now raises five issues on appeal: (1) that § 951 is unconstitutionally vague as applied to the facts of this case; (2) that Federal Rule of Evidence 404(b) character evidence was admitted for an improper purpose; (3) that the Government engaged in prosecutorial misconduct by improperly commenting on the Rule 404(b) evidence; (4) that evidence of Duran and his co-conspirators' lack of knowledge of the notification requirement under § 951 was erroneously excluded; and (5) that the district court should have admitted several hearsay statements evidencing Duran's lack of intent to act as an agent of a foreign government under § 951. Upon considering the briefs, the record, and after the benefit of oral argument, we affirm Duran's convictions under 18 U.S.C. §§ 371 and 951.

Appendix A

I. BACKGROUND

Duran was a co-proprietor of Venoco, the largest private petro-chemical enterprise in Venezuela, which is reliant upon the operations of Petroleos de Venezuela, S.A. ("PDVSA"), an energy corporation and monopoly owned and operated by the Venezuelan government. Several of Duran's other ventures were also heavily dependent upon the favor of the Venezuelan government. Carlos Kauffmann ("Kauffmann") was one of Duran's co-conspirators and Duran's main business partner, as the other co-proprietor of Venoco. Prominent among Duran's business partners was Guido Alejandro Antonini Wilson ("Antonini"), a dual citizen of Venezuela and the United States, who engaged in commercial dealings with the Venezuelan government and other ventures involving Venezuelan co-investors. In addition to being business partners, Duran, Kauffmann, and Antonini were personal friends.

The "Suitcase Scandal" between Argentina and Venezuela erupted on August 4, 2007, when Argentine customs agents searched a suitcase Antonini was carrying upon arrival in Buenos Aires, Argentina on a private plane chartered by the PDVSA. A customs agent discovered approximately $800,000 in United States currency in the suitcase. It is a criminal violation in Argentina to fail to declare more than $10,000 being imported into the country. Antonini, traveling on his Venezuelan passport, executed a customs statement in which he listed Duran's Caracas, Venezuela apartment as his residence. Thereafter, Antonini attended a

reception for Venezuelan President Hugo Chavez in Buenos Aires and boarded the first flight to Miami. As a result of Antonini leaving Argentina without resolving the introduction of $800,000 into Argentina without declaring it, the Argentine authorities began extradition proceedings against Antonini. Communication among Antonini, Duran, and Kauffmann commenced immediately after Antonini returned to Miami because Duran and Venoco had been implicated when Antonini listed Duran's apartment on the customs statement. The media speculated that the discovery of the suitcase with $800,000 was evidence that the governments of Venezuela and Argentina had been secretly channeling large sums of money from PDVSA to Argentine presidential candidate Cristina Fernandez de Kirchner, favored by the Venezuelan regime.

After being implicated in the "Suitcase Scandal," Duran contacted Tarek Al-Aissimi, Venezuela's Minister of the Interior, and General Henry Rangel Silva ("Rangel"), Director of the Venezuelan intelligence agency, Direccion de los Servicios de Inteligencia y Prevencion (the "DISIP"). They informed Duran that the DISIP would be handling the "Suitcase Scandal." On August 10, 2007, Duran and his brother, a DISIP agent, traveled to Miami to get Antonini to set forth a full written account of the incident with the suitcase. Antonini gave the Durans a full oral recounting, but he declined to provide the requested written narrative. Shortly thereafter, Antonini hired an attorney and entered into a cooperation agreement with the FBI. In Venezuela, the DISIP formulated a strategy to defuse

the "Suitcase Scandal" in hopes of concealing evidence that the $800,000 found in the suitcase was a campaign contribution from the Venezuelan government to the Argentine presidential candidate. The DISIP proposed that a forged and back-dated document purporting to attest to Antonini's removal of $800,000 of his own money from Venezuela be placed in the files of Venezuela's customs authority. Then, the DISIP would retain an Argentine lawyer, pursuant to Antonini's execution of a power of attorney, to represent Antonini for failing to declare the money upon arrival in Argentina. Thus, if Antonini were to claim the money as his own, the matter would be resolved between Venezuela and Argentina without any implication that the money was being funneled to the Argentine presidential candidate.

In order to secure Antonini's cooperation, the DISIP retained a Venezuelan attorney, Moises Maionica ("Maionica"), one of the co-conspirators who pled guilty and testified against Duran, believing that he could address Antonini's legal concerns and prepare and oversee the execution of a power of attorney.[1] The DISIP also enlisted the help of Duran and Kauffmann because of their personal relationship and potential influence over Antonini. Duran, Kauffmann, and Maionica met with Antonini several times in Miami to discuss the DISIP's strategy and to convince Antonini to cooperate. Antonini wore a recording device provided

1. Maionica was retained and compensated by the DISIP. He acknowledged that, at all times, he acted as an agent of the Venezuelan government.

by the FBI to all of the meetings. Duran repeatedly tried to get Antonini to sign a power of attorney. D.E. 318 at 80. Duran, Kauffmann, and Maionica assured Antonini that the Venezuelan and Argentine governments would come to an agreement, and Argentina would drop the charges against Antonini once he executed the power of attorney. Antonini raised some concerns with the proposal and remained non-committal.

After several unsuccessful attempts to get Antonini to sign the power of attorney, Duran, Kauffmann, and Maionica met with Rangel at the DISIP headquarters in Caracas, Venezuela. Duran told Rangel that he would seek to get Antonini to sign the power of attorney. *Id.* In September 2007, Duran met with Antonini and encouraged him to sign the power of attorney, but Antonini refused. Frustrated with Antonini's non-cooperation, Duran did not meet with Antonini again until December 2007. In early October 2007, Antonini sent a written offer to President Hugo Chavez, requesting $2 million in monetary compensation and DISIP assistance in forging sufficient documentation to corroborate his ownership of the $ 800,000 seized by Argentine officials. On October 28, Antonini met with DISIP agent Antonio Jose Canchica Gomez ("Gomez") in a recorded meeting and reiterated the demands he made to Chavez. Gomez accepted the offer on behalf of Chavez. After Rangel confirmed the terms with Antonini via telephone, the only remaining question was how the $2 million would be transferred. At a meeting on December 11, 2007, Duran supplied Antonini with the falsified documents that would justify Antonini bringing

$800,000 into Argentina. They also discussed the power of attorney and the payment of the $ 2 million. As Duran and Maionica left the meeting, the FBI arrested them.

Before trial, the Government filed several motions *in limine* relevant to this appeal. First, the Government sought to preclude the presentation of evidence regarding the foreign policy or lack of foreign policy between the United States and Venezuela. The Government was concerned that Duran would introduce such evidence to show that Duran was the subject of a political prosecution designed to embarrass the Venezuelan government for illegally contributing to an Argentine presidential candidate. The Government argued that relations between the United States and Venezuela had nothing to do with Duran's specific criminal conduct or the statutes he violated. Additionally, the Government argued that permitting Duran to raise the defense of being politically prosecuted would be an invitation for improper jury nullification. Duran responded that the evidence of foreign policy relations between the United States and Venezuela was directly relevant to the motives of the Government witnesses, and that the only purpose of the prosecution was to embarrass the Chavez government in Venezuela by using Duran as a scapegoat. However, at the status conference, Duran admitted that he would not defend the case on the basis that it was a political prosecution, even though he said it was. D.E. 216 at 40. Thus, the district court granted the Government's motion *in limine* to exclude evidence of foreign policy relations between the United States and Venezuela because it was facially irrelevant to the crimes charged.

Second, the Government sought to preclude Duran from introducing evidence about, or making argument regarding, Duran's assertion that he did not know about the duty to notify the Attorney General that he would be acting as a foreign agent on the grounds that such evidence or argument was irrelevant and confusing to the jury. Duran responded that knowledge of the notification requirement is relevant to the jury's determination of whether Duran acted with knowledge that his conduct was unlawful for purposes of establishing his participation in the charged conspiracy and whether he acted under the direction and control of a foreign government. The district court granted the Government's motion *in limine* excluding evidence of *mens rea* of Duran's failure to notify the Attorney General of his conduct as a foreign agent because § 951 is a general intent crime that does not require proof that a defendant knew of the notification requirement. However, the district court did not preclude the introduction of *mens rea* evidence as to the element of knowingly acting as an agent of a foreign government.

The Government also filed a motion *in limine* seeking to introduce evidence pursuant to Federal Rule of Evidence 404(b) of Duran and Kauffmann's numerous schemes of giving "kickbacks" to officials of various agencies of the Venezuelan government, as well as to officials of various states of Venezuela. The Government argued that such evidence was admissible under Rule 404(b) because it was relevant to issues other than Duran's character, including whether Duran knowingly conspired with Kauffmann and others to act as agents

of the Venezuelan government; whether Duran knowingly acted as an agent of the Venezuelan government; and whether there was a preexisting relationship between Duran and the Venezuelan government. In response, Duran argued that the alleged kickback schemes were irrelevant because none of the kickback schemes involved the DISIP or any official with an identified connection to the DISIP. The district court initially denied the Government's request to introduce evidence of Duran's kickbacks and only permitted Kauffmann to testify generally in its case-in-chief that he and Duran gave kickbacks to Venezuelan government officials.

Mid-trial, however, the district court permitted Duran to raise the defense of entrapment. Duran initially advanced the theory that he acted wholly independent of the Venezuelan government based upon concern for his own affairs. Duran revised this initial defense to posit that, while he initially acted on his own, he became "entrapped" into acting as Venezuela's agent by Antonini's insistence that the aid he sought be provided by the Venezuelan government. Upon request by the Government, the district court permitted the introduction of Duran's kickbacks through Kauffmann's rebuttal testimony under Rule 404(b) because the evidence was directly relevant to show Duran's predisposition to act as an agent of the Venezuelan government, and thus was admissible to negate Duran's entrapment defense.

At trial, the prosecution presented its case through the testimonies of Antonini, Maionica, and Kauffmann, as amplified by the FBI's recorded conversations. A jury convicted Duran of violating 18 U.S.C. §§ 371 and 951, and the district court sentenced him to 48 months' imprisonment followed by a term of three years' supervised release.

II. DISCUSSION

A. 18 U.S.C. § 951 Is Not Unconstitutionally Vague

We review whether a statute is unconstitutionally vague *de novo*. *United States v. Paradies*, 98 F.3d 1266, 1282 (11th Cir. 1996) (citing *Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Comm'rs*, 32 F.3d 1436, 1443 (10th Cir. 1994)). Duran argues that § 951 is unconstitutionally vague as applied to the facts of this case. Specifically, he contends that he did not have notice, and could not have had notice, of his obligation to notify the Attorney General of his purportedly legal conduct in the United States on behalf of the Venezuelan government, presumably because he was not an employee of or spy for the Venezuelan government. The jury found, however, that he was an agent of a foreign government. Section 951(a) provides that "[w]hoever, other than a diplomatic or consular officer or attache, acts in the United States as an agent of a foreign government without prior notification to the Attorney General" is guilty of a crime. Section 951's corresponding regulations set forth further guidance on compliance with the statute. *See* 28 C.F.R. § 73.1 *et seq.*

Appendix A

Void for vagueness "means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32-33 (1963) (citing *United States v. Harriss*, 347 U.S. 612, 617 (1954)). If a vagueness challenge to a statute does not involve the First Amendment, the analysis must be as applied to the facts of the case. *United States v. Mazurie*, 419 U.S. 544, 550 (1975) (citing *Nat'l Dairy Prods. Corp.*, 372 U.S. at 32); *United States v. Awan*, 966 F.2d 1415, 1424 (11th Cir. 1992) (citing *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988)). We apply the two-part standard set forth in *Kolender v. Lawson*, 461 U.S. 352 (1983), when we evaluate a vagueness challenge; it "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Awan*, 966 F.2d at 1424 (quoting *Kolender*, 461 U.S. at 357 (internal quotation marks omitted)). "[S]tatutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language," and there is a strong presumption supporting the constitutionality of legislation. *Nat'l Dairy Prods. Corp.*, 372 U.S. at 32.

Additionally, as the Supreme Court in *Cheek v. United States* stated, "[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system." 498 U.S. 192, 199 (1991). Because this rule is

based on the common law notion that presumes that every person knows the law, and the law is definite, the Supreme Court has applied it to cases construing criminal statutes. *Id.*

1. The Plain Language of § 951 is Readily Understandable

In analyzing a vagueness claim, the first step in determining whether a statute provides fair warning is to begin with the language of the statute itself. *United States v. Hunt*, 526 F.3d 739, 743 (11th Cir. 2008). Where the language alone sets forth plainly perceived boundaries, no further inquiry is necessary. *Id.* at 744. To violate § 951, (1) a person must act; (2) the action must be taken at the direction of or under the control of a foreign government; and (3) the person must fail to notify the Attorney General before taking such action. *See* 18 U.S.C. § 951(a) (criminalizing "acts" of "an agent of a foreign government without prior notification to the Attorney General"); 18 U.S.C. § 951(d) (defining "agent of a foreign government" as "an individual who agrees to operate within the United States subject to the direction or control of a foreign government or official"); 28 C.F.R. § 73.1(a) (defining "agent" as "all individuals acting as representatives of, or on behalf of, a foreign government or official, who are subject to the direction and control of that foreign government or official"); 28 C.F.R. § 73.3 (detailing the procedure and means of giving notification to the Attorney General). Nothing in § 951 is, in the context before us, vague. Here, § 951 plainly and concretely identifies the conduct which

constitutes its violation, and the statute's language is clear and unambiguous. *See United States v. Latchin*, 554 F.3d 709, 715 (7th Cir. 2009) (finding that "[i]t was enough for the jury to conclude that Latchin took acts of *some kind* on behalf of Iraq without first registering as a foreign agent" (emphasis in original)); *see also United States v. Truong Dinh Hung*, 629 F.2d 908, 920 (4th Cir. 1980) (finding the term "agent" to be clear on the face of the statute); *United States v. Lindauer*, S.D.N.Y. 2004, __ F. Supp. 2d __, at *4, 2004 U.S. Dist. LEXIS 24661 (No. S2 03 CR. 807 (MBM), Dec. 6, 2004) (same). Therefore, the plain language of § 951 and its corresponding regulations give notice of what is prohibited and are readily understandable to a person of ordinary intelligence.

2. Section 951 Is a General Intent Crime

Looking beyond the statutory language, Duran argues that § 951 is unconstitutionally vague because it must require an element of specific intent that a defendant knew of the duty to notify the Attorney General of conduct that necessarily involves espionage or subversive activity as an agent of a foreign government. Specifically, Duran argues that he could not have had notice of the notification requirement without the specific intent to fail to notify the Attorney General or the specific intent to engage in espionage or subversive activity, which would have given him the probability of knowledge of the notification requirement. However, we have routinely validated general intent statutes against vagueness challenges without

suggesting that the lack of a specific intent component heightens its need for definiteness or otherwise renders the provision susceptible to constitutional doubt. *See, e.g., United States v. Eckhardt*, 466 F.3d 938, 943-44 (11th Cir. 2006) (placing "'annoying, abusive, harassing, or threatening telephone calls' in violation of 47 U.S.C. § 223(a)(1)(C)" is not vague despite absence of specific intent element); *United States v. Hedges*, 912 F.2d 1397, 1403 (11th Cir. 1990) (finding strict liability offense requiring no scienter was not vague as judged by normal constitutional standard).

Section 951's plain language makes it clear that it is a general intent crime, as there is no *mens rea* element on the face of the statute. Additionally, in *United States v. Campa*, we affirmatively held that § 951 is a general intent crime, and knowledge of the notification requirement need not be proven by the Government. 529 F.3d 980, 999 (11th Cir. 2008). We joined the Seventh Circuit in *Dumeisi*, holding that "section 951 does not require proof that the defendant knew of the requirement to register." *Id.* The silence of § 951 as to a specific intent element is dispositive of the fact that Congress intended it to be one of general intent. *Id.* (citing *United States v. Ettinger*, 344 F.3d 1149, 1158 (11th Cir. 2003)). "[A] defendant need not intend to violate the law to commit a general intent crime, but he must actually intend to do the act that the law proscribes." *Id.* (alteration in original) (quoting *United States v. Phillips*, 19 F.3d 1565, 1576-77 (11th Cir. 1994)) (internal quotation marks omitted). Section 951 proscribes acting as an agent of a foreign government

without first notifying the Attorney General, and a person of ordinary intelligence can understand what conduct the statute prohibits. Although we found that § 951 does not require a showing of a heightened *mens rea* requirement, the Government must still prove the *mens rea* of general intent. *Id.* In fact, the district court in *Campa* correctly instructed the jury "that the defendants must have acted 'knowingly,' and that they must have known 'that [they] had not provided prior notification to the Attorney General.'" *Id.* (alteration in original). What the statute prohibits is clear on its face, and ignorance of the law is no defense to a criminal prosecution. *See id.* Accordingly, the fact that § 951 requires only general intent merely subjects it to simple linguistic scrutiny.

3. Section 951 Does Not Require Actual Notice or Knowledge of the Notification Requirement

Despite our precedent and the plain language of § 951, Duran argues that the statute must be read to require actual knowledge or probability of knowledge of the notification requirement by affirmatively engaging in espionage or subversive activities. Duran argues that in order to avoid a vagueness challenge, we must read into § 951 an element of specific intent.

It is true that knowledge of a registration or notification statute is required in some cases; however, knowledge or probability of knowledge is not an element under § 951, and Duran is deemed to have notice

because the statute requires the affirmative action and conduct of the defendant. Although § 951 appears to be a registration statute similar to the ordinance held unconstitutional in *Lambert v. California*, in which the defendant was convicted for violating a Los Angeles ordinance requiring all convicted felons who remain in Los Angeles for more than five days to register, whether a defendant must register under § 951 depends on the defendant's *action* and *conduct* as an agent of a foreign government. 355 U.S. 225, 226-27 (1957); *see Latchin*, 554 F.3d at 715. Whereas the registration statute in *Lambert* was held unconstitutional in part because it required the defendant merely to hold the status of felon, under § 951, it is not sufficient for the defendant to hold the status of an agent of a foreign government—he must also act. *See* 355 U.S. at 228 (finding the defendant's conduct "wholly passive"). Essentially, the *Lambert* Court distinguished between misfeasance and nonfeasance, and here, Duran engaged in misfeasance by "acting" as an agent of a foreign government without notifying the Attorney General before doing so.

Duran also cites *United States v. Mancuso*, a Second Circuit case in which the defendant was convicted under a statute that "requires any citizen convicted of narcotics or marijuana offenses, as well as those who are addicted to, or 'use' narcotics drugs, to register with customs officials on leaving and entering the country." 420 F.2d 556, 556 (2d Cir. 1970). The Second Circuit held that knowledge or probability of knowledge of the registration requirement is an element that must be established in order to be convicted under the statute

because finding that the defendant's conduct was nonfeasance would render the statute unconstitutional, but requiring probability of knowledge of the registration requirement would save it. *Id.* at 557-58. Thus, the Second Circuit read into the statute the element of probability of knowledge, finding that the defendant did not have probability of knowledge of the registration requirement, and therefore, could not be convicted under the statute. *Id.* at 558. Duran similarly argues that the element of knowledge or probability of knowledge of the notification requirement cannot be separated from § 951. However, the *Mancuso* decision is only persuasive authority in this Circuit, and our Court already decided in *Campa* that knowledge of the registration requirement is not an element of § 951. Additionally, § 951 requires misfeasance, which was not required under the statute at issue in *Mancuso*.[2] Thus, unlike the registration requirements in *Lambert* and *Mancuso*, which were based on the defendant's status as a convicted felon or narcotics violator, conviction under § 951 involves affirmative action or conduct on behalf of a foreign government, and Duran is deemed to have notice.

2. While in some areas the distinction between nonfeasance and misfeasance may not be clear, this is not an issue for this case. Status is not the issue in any sense, rather specific actions are at issue. Further, if there were any such confusion, the area of foreign intelligence activities is one which is highly regulated and a notification or registration requirement normally would not be unexpected by one who acts as an intermediary for a foreign government.

Appendix A

Duran argues that in order to have sufficient notice of the notification requirement, his conduct must also have necessarily involved an intent to engage in espionage or traditional notions of spying and subversive activity. He argues that his purportedly innocent conduct could not have given him the probability of knowledge of the registration requirement. Duran relies on the legislative history of § 951 and argues that all of the cases that involve criminal prosecution under § 951 relate to some form of subversive activity or espionage-related component. However, there is no suggestion in the language of the statute, the legislative history, or cases that convictions under § 951 require the conduct to be of that nature. To the contrary, the activities that fall within § 951's purview have never been expressly or by judicial interpretation limited to those bearing upon national security or even those which by their nature are criminal or inherently wrongful. *See Latchin*, 554 F.3d at 715 (uncertain acts of "*some kind*" were sufficient to establish guilt under § 951 (emphasis in original)); *Dumeisi*, 424 F.3d at 581 (transmitting publicly available information was sufficient).[3] In fact, the Northern District of Illinois found that § 951 is not unconstitutional, even though it requires registration when *no* future criminal activity is anticipated. *United States v. Melekh*, 193 F. Supp. 586, 592 (N.D. Ill. 1961).

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3. Although these cases involved agents of a foreign government acting for espionage-related purposes and goals, the conduct for which the agents were convicted under § 951 did not involve illegal activity or traditional subversive conduct.

Relying on legislative history, Duran asserts that his failure to have anticipated the statute's registration requirement stemmed from the fact that his conduct did not involve espionage or traditional spying on the United States government, what he categorizes as the primary focus of § 951. "When the text of a statute is plain, however, we need not concern ourselves with contrary intent or purpose revealed by the legislative history." *Hunt*, 526 F.3d at 744. Duran contends that for over ninety years, the only application of § 951 has been to prosecute cases dealing with espionage or subversive activities against the United States. However, the plain language of § 951 does not exclude from its scope cases that do not involve such subversive activities. "Congress is free to pass laws with language covering areas well beyond the particular crisis *du jour* that initially prompted legislative action." *Id.*

Although Congress' original intent in 1917 was national security, defense, and targeting espionage and subversive acts,[4] over time, the original 1917 Act broke

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4. The earliest form of § 951 was enacted on June 15, 1917, shortly after the United States entered World War I. It was part of "An Act To punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes." Act of June 15, 1917, ch. 30, 40 Stat. 217 (codified as amended at 18 U.S.C. § 951 (1948)). In fact, the predecessor to § 951 is found in Title VIII, § 3 entitled: "Disturbance of foreign relations." *Id.* at 226. Legislative history suggests that the 1917 Act was a war-time

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off into three directions to form three separate registration or notification statutes dealing with agents of foreign governments. Congress enacted legislation targeted specifically at such subversive acts through the Foreign Agents Registration Act of 1938 ("FARA")[5] and 50 U.S.C. § 851,[6] and Congress separated § 951,

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act to protect the United States from subversive elements that could threaten America's war effort. This is because, in its Congressional Reports, Congress labeled the act, "To Punish Espionage and Enforce the Criminal Laws of the United States," H.R. Rep. No. 65-30, at 1 (1917), and "Espionage Bill," H.R. Rep. No. 65-65, at 1 (1917) (Conf. Rep.); H.R. Rep. No. 65-69, at 1 (1917) (Conf. Rep.).

5. FARA, 22 U.S.C. § 611 *et seq.*, is primarily aimed at foreign political propagandists and political activists that the United States has an interest in keeping track of, and it requires agents of foreign principals to identify themselves and their foreign principals, disclose their activities, and file and label political propaganda. FARA's registration provision states in pertinent part, "No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement . . . unless he is exempt from registration." 22 U.S.C. § 612(a). Thus, this is one example of a statutory registration requirement enacted after the 1917 Act that specifically covers "agents of foreign principals" as defined under 22 U.S.C. § 611(c).

6. On August 1, 1956, Congress enacted 50 U.S.C. § 851 "Registration of certain persons; filing statement; regulations" under Title 50 "War and National Defense," Chapter 23 "Internal Security," Subchapter V "Registration of Certain Persons Trained in Foreign Espionage Systems." Section 851 states in pertinent part that,

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classifying it under "Foreign Relations." The limited legislative history persuasively suggests that Congress chose to separate § 951 and treat it as a catchall statute that would cover all conduct taken on behalf of a foreign government.[7] Thus, Duran's argument that he could not

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> [E]very person who has knowledge of, or has received instruction or assignment in, the espionage, counter-espionage, or sabotage service or tactics of a government of a foreign country or of a foreign political party, shall register with the Attorney General by filing with the Attorney General a registration statement in duplicate, under oath, prepared and filed in a such manner and form, and containing such statements, information, or documents pertinent to the purposes and objectives of this subchapter as the Attorney General, having due regard for the national security and the public interest, by regulations prescribes.

Thus, § 851 is an espionage registration statute, while § 951 is a broader, catch-all notification statute aimed at all foreign relations in general.

7. On March 28, 1940, the 1917 version of § 951 was amended and codified under Title 22 "Foreign Relations and Intercourse" Section 601 "Acting as a foreign governmental agent without notice to Secretary of State." 22 U.S.C. § 601 was codified under the same subchapter as FARA. Act of March 28, 1940, ch. 72, § 6, 54 Stat. 79, 80 (codified at 22 U.S.C. § 601). Then, in 1948, 22 U.S.C. § 601 was repealed and re-codified under 18 U.S.C. § 951 "Agents of foreign governments" under Chapter 45 "Foreign Relations." Thus, it became a completely separate notification statute from FARA, and it continues to cover any action of conduct by an agent of a foreign government.

have had notice of the registration requirement under § 951 is meritless because registration is not only required of spies or foreign agents engaged in subversive acts under FARA or § 851, but it also reaches beyond such classifications to *any* affirmative conduct undertaken as an agent of a foreign government. Additionally, 28 C.F.R. § 73.6 states that "[t]he filing of a notification under [§ 951] shall not be deemed compliance with the requirements of the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. § 611 et seq., nor compliance with any other statute."

The Government is vested with sound discretion in determining who to prosecute and under what laws to prosecute. Here, the Government exercised its prosecutorial discretion to convict Duran for violating § 951, which permits prosecution so long as Duran acted on behalf of a foreign government and failed to notify the Attorney General of such action, regardless of the nature of such action.[8]

The broad sweep of § 951 creates a plethora of possibilities under which those engaged in purportedly legal conduct on behalf of a foreign government could be convicted if an agent of a foreign government fails to notify the Attorney General of such conduct. Here, it is

8. It is therefore understandable why the district court excluded evidence regarding the foreign policy between the United States and Venezuela because such evidence is irrelevant and has no relation to the elements of §§ 951 or 371 or to the exercise of the Government's prosecutorial discretion.

hard to imagine that Duran was acting completely innocently because his actions generally involved bribery and extortion, even if not violations of United States law. Section 951 sweeps broadly because the Government has an interest in knowing the identity of those acting on behalf of a foreign government within the United States, whether the action is legal or not. By its plain text, the statute placed Duran on notice that his conduct was unlawful.

Section 951 is not unconstitutionally vague as applied to Duran. The jury determined that Duran acted to convince Antonini to sign a power of attorney and delivered false documents to Antonini; that his action was on behalf of the Venezuelan government; and that Duran failed to notify the Attorney General of such action before acting. This Court has already determined that § 951 is a general intent crime, and Duran did not need to know of the notification requirement before acting. Section 951 covers any and all affirmative conduct taken on behalf of a foreign government, and is not limited to espionage or subversive activities. The case for upholding Duran's conviction under § 951 is particularly strong because the language is readily understandable by a person of ordinary intelligence, his conduct involved some form of bribery or extortion on behalf of the Venezuelan government, and Duran's conviction was not based on mere status as an agent of the Venezuelan government.[9]

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9. Because Duran's conduct was not innocent, we need not in this case express an opinion as to the constitutionality of possible applications of § 951 to completely innocent conduct.

B. Evidentiary Issues

We review evidentiary rulings for an abuse of discretion. *Eckhardt*, 466 F.3d at 946 (citing *United States v. Henderson*, 409 F.3d 1293, 1297 (11th Cir. 2005)).

1. Evidence of Knowledge of the Notification Requirement under § 951 Was Properly Excluded

Duran argues that the district court abused its discretion in excluding evidence of *mens rea* to show that Duran and his co-conspirators did not know of the notification requirement under § 951. As discussed in § A *supra*, this Court in *Campa* held that a defendant need not know of the notification requirement under § 951 in order to be convicted. 529 F.3d at 999. "For a conviction of conspiracy, there must be proof of (1) an agreement between two or more persons, (2) an unlawful purpose, and (3) an overt act committed by one of the coconspirators in furtherance of the conspiracy." *United States v. Wieschenberg*, 604 F.2d 326, 331 (5th Cir. 1979).[10] "In addition, 'in order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense

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10. In *Bonner v. City of Prichard*, this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981. 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

itself.'" *Id.* (quoting *United States v. Feola*, 420 U.S. 671, 686 (1975)). Thus, the Government had to prove that Duran knowingly acted as an agent of a foreign government without first notifying the Attorney General, and that his co-conspirators knew that he acted as such.

Duran argues that because conspiracy and aiding and abetting require willfulness, they import a higher *mens rea* into the substantive charge under § 951, and thus, evidence of Duran's averred lack of knowledge of the registration requirement is relevant. Although conspiracy is a specific intent crime, and aiding and abetting of a substantive violation must be willfully undertaken, those theories of vicarious liability do not import into either the conspiracy charge or the substantive offense under § 951 that Duran be on actual notice of the registration requirement. *See Feola*, 420 U.S. at 686-87. *Feola* reiterates the longstanding and uniformly recognized rule that the conspiracy statute does not impose its scienter requirement upon the general intent offense that is the object of the conspiracy. *Id.; see also United States v. Muncy*, 526 F.2d 1261, 1264 (5th Cir. 1976) (citing *Ingram v. United States*, 360 U.S. 672, 678 (1959)).

The district court did not abuse its discretion in excluding evidence of Duran and his co-conspirators' lack of knowledge of the registration requirement under § 951 because this Court's precedent makes clear that knowledge of the registration requirement is not an element of the offense under § 951. *Campa*, 529 F.3d at 999.

2. Evidence of State of Mind Exception to the Hearsay Rule Was Properly Excluded

Duran argues that the district court abused its discretion in excluding admissible hearsay evidence under the Federal Rule of Evidence 803(3) state of mind hearsay exception proffered by Duran to show that he did not intend to act as an agent of the Venezuelan government. Rule 803(3) provides that regardless of whether the declarant is unavailable as a witness, the hearsay rule does not exclude:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed.

The Supreme Court held that out-of-court statements admitted into court to establish intent are admissible. *Mutual Life Ins. Co. of N.Y. v. Hillmon*, 145 U.S. 285, 295 (1892). "[T]he state-of-mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed that would have induced the state of mind." *United States v. Cohen*, 631 F.2d 1223, 1225 (5th Cir. 1980).

Duran argues that several hearsay statements should not have been excluded under Rule 803(3) because they tended to prove that Duran did not intend

to act as an agent of the DISIP. The Government argues that the district court never reached the question of whether the contested testimony lay outside the permissible scope of Rule 803(3); rather, the court's rulings were based upon its finding that the testimony was irrelevant and excludable under Rule 401. That Duran told a United States customs agent that he was in the United States to meet with Antonini, while he was carrying newspaper articles related to the Antonini matter was properly excluded because it did not meet Rule 401's test for relevancy, while statements concerning Venoco's future did not fall within the state of mind exception because they explain why Duran had a concerned state of mind.

Further, the final statement, that Duran told Maionica "I'm never bringing [Antonini] that money," was arguably relevant but not particularly probative. D.E. 409 at 4. While Duran argues that his statement was a clear expression of intent used to show Duran was not acting as an agent of the DISIP, the Government correctly argues that Duran's proclaimed intent to deprive Antonini of his $2 million bribe provides no insight as to whether Duran had, over the preceding four months, acted as Venezuela's agent. Additionally, the Government correctly argues that Duran's acknowledgment that the DISIP was going to entrust him with $2 million in cash strongly suggests that he was, in fact, Venezuela's trusted representative. The admissibility of Duran's statement that he did not intend to deliver the money to Antonini for the purpose of showing that Duran did not intend to act as an agent of

the DISIP was a close call under Rule 803(3), and the exclusion of the statement, if error, was harmless.

3. The Rule 404(b) Evidence Was Properly Admitted

Duran argues that the district court abused its discretion by admitting evidence of Duran and Kauffmann's payment of illegal kickbacks to various Venezuelan government officials to establish his motive and intent to commit the charged crimes under Federal Rule of Evidence 404(b), as well as to counter his belated claim of entrapment by showing predisposition to commit the crimes.

Under Rule 404(b), evidence of uncharged criminal conduct is admissible only if relevant to an issue other than the defendant's character or propensity to commit a crime. *See United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc). Rule 404(b) allows for the introduction of evidence of an extrinsic act if the Government "can demonstrate: (1) a proper purpose for introducing the evidence; (2) that the prior act occurred and that the defendant was the actor; and (3) that the probative value of introducing the evidence outweighs any prejudicial effect the evidence might have." *United States v. Cancelliere*, 69 F.3d 1116, 1124 (11th Cir. 1995) (citing *United States v. Perez-Garcia*, 904 F.2d 1534, 1544 (11th Cir. 1990)). Duran contends that the evidence of giving kickbacks to the Venezuelan government and various officials was not properly offered to show intent or motive, but merely as improper propensity evidence,

as reflected in the prosecutor's closing argument, in which he referred to Duran's "life of crime." D.E. 422 at 109-10.

The evidence of Duran's kickbacks was properly admitted by the district court under Rule 404(b). First, the Government provided a proper purpose for introducing the evidence because Kauffmann's testimony showed similar criminal acts by Duran that went to Duran's intent and motive to knowingly act as an agent of the DISIP. Second, Kauffmann's testimony stated that Duran paid kickbacks to various Venezuelan government officials. *See United States v. Dickerson*, 248 F.3d 1036, 1047 (11th Cir. 2001) (citing *United States v. Bowe*, 221 F.3d 1183, 1192 (11th Cir. 2000)) (finding that uncorroborated testimony provided sufficient basis for concluding that the defendant committed extrinsic acts).[11] Third, the danger of unfair prejudice to Duran was minimal because the Government showed that the introduction of the kickbacks was probative to establish the relationship between Duran and the Venezuelan government, and the court instructed the jury regarding the proper purpose of such evidence. *See United States v. Baker*, 432 F.3d 1189, 1205 (11th Cir. 2005) (quoting *United States v. Meester*, 762 F.2d 867, 875 (11th Cir. 1985)) (stating that effectiveness of a limiting instruction should be part of the court's analysis in determining admissibility under Rule 404(b)); D.E. 348 at 85-86.

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11. Duran does not dispute that he gave such kickbacks, only that such evidence should be excluded.

In addition to being admitted under Rule 404(b) for a proper purpose, the kickback evidence was properly admitted in order for the Government to rebut Duran's entrapment defense by establishing Duran's predisposition to act as an agent of a foreign government without first notifying the Attorney General. Entrapment requires "government inducement of the crime and a lack of predisposition by the defendant to commit the crime." *United States v. Ventura*, 936 F.2d 1228, 1230 (11th Cir. 1991) (citing *Mathews v. United States*, 485 U.S. 58, 63 (1988)). After the defendant raises the defense of entrapment, the burden shifts to the Government to show that the defendant was predisposed to commit the offense charged beyond a reasonable doubt. *Id.* (citation omitted). According to Duran, the kickback evidence was not sufficiently similar to the violation of § 951 or the conspiracy to violate § 951 because Duran's previous transactions with the Venezuelan government were not with the DISIP or connected to this case. However, because similar acts used to demonstrate predisposition are offered precisely to show propensity, they are more broadly applicable, and their use is not subject to the normal constraints of evidence admitted pursuant to Rule 404(b). *See United States v. Burkley*, 591 F.2d 903, 922 (D.C. Cir. 1978); *United States v. Dickens*, 524 F.2d 441, 444 (5th Cir. 1975) (citations omitted).

Essentially, because the defendant puts his character at issue by raising an entrapment defense, he cannot complain that the Government introduces evidence as to such character. *Sorrells v. United States*,

287 U.S. 435, 451 (1932). Finally, the Government argued that Duran's previous dealings with the Venezuelan government were based upon his agreement to "kick back" profits to influential officials. Similarly, Duran's anticipated benefits in this case were dependent upon his willingness to extort or bribe Antonini into remaining silent in order to receive favors from the DISIP or Venezuelan government in the future.

The district court did not abuse its discretion in admitting the Government's Rule 404(b) evidence of Duran's payment of kickbacks to various Venezuelan government officials because it showed Duran's intent, motive, and predisposition to knowingly act as an agent of a foreign government.

C. Any Prosecutorial Misconduct Was Harmless

Duran alleges that the Government engaged in prosecutorial misconduct during his closing argument by improperly commenting on the Rule 404(b) evidence, with statements that Duran "spent the last ten years of his life bribing . . . officials" and that Duran had been involved in a "life of crime." D.E. 422 at 82, 109-10. We review allegations of prosecutorial misconduct *de novo* because it is a mixed question of law and fact. *Eckhardt*, 466 F.3d at 947. In analyzing allegations of prosecutorial misconduct, we must assess whether the challenged comments were improper, and if so, whether they affected the substantial rights of the defendant. *Campa*, 529 F.3d at 997 (quoting *United States v. Castro*, 89 F.3d 1443, 1450 (11th Cir. 1996)). "A defendant's substantial

rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome of the trial would have been different." *Eckhardt*, 466 F.3d at 947 (citing *United States v. Wilson*, 149 F.3d 1298, 1301 (11th Cir. 1998)). "When the record contains sufficient independent evidence of guilt, any error is harmless." *Id.* (citing *United States v. Adams*, 74 F.3d 1093, 1097-98 (11th Cir. 1996)).

Although the Government's comments could be construed by the jury as an effort to characterize the challenged remarks as improper propensity evidence, there was more than enough other evidence of guilt beyond a reasonable doubt for the jury to convict Duran of violating §§ 951 and 371. Because the district court properly instructed the jury as to the purpose for which Rule 404(b) evidence was introduced, we find that the prosecutor's comments did not prejudicially affect Duran's substantial rights at his trial, and therefore, any error was harmless.

III. CONCLUSION

We affirm the convictions of Duran under 18 U.S.C. §§ 371 and 951. Section 951 is not unconstitutionally vague as applied to Duran. The district court did not abuse its discretion by excluding evidence of Duran's lack of knowledge of the notification requirement under § 951, by excluding Duran's hearsay statements, or by admitting the Rule 404(b) evidence of Duran's kickbacks to various officials of the Venezuelan government. Finally, although the Government arguably engaged in prosecutorial misconduct during closing statements, such error was harmless. We therefore affirm Duran's convictions as to all counts.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 25, 2010

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09-11446-CC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANKLIN DURAN,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

Before: WILSON and ANDERSON, Circuit Judges, and RESTANI,* Judge.

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* Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

Appendix B

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE